92-450

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

THOMAS G. CARPENTER,

Petitioner,

vs.

UNIVERSAL STAR SHIPPING, S.A.,
a foreign corporation; and
SEALASKA TIMBER CORPORATION,
a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the vessel's duty to intervene under §905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") limited to dangers in the ship's gear or does it extend to hazards in the stow when the stevedore's decision to continue working in the face of the risk is obviously improvident?

2. Does a provision in,

(a) a time charter imposing on the vessel owner "responsibility at all times for stowage, which must be controlled by the master," or

(b) an agreement requiring a voyage charterer to "supervise and assure compliance" by the stevedore with safety regulations,

affect the vessel's duty of care to longshore workers under §905(b) of LHWCA or only questions of indemnity by an owner or charterer?

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28 U.S.C. §1254(l) 1

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29 C.F.R. §1918.32(b) 2, 9

OPINIONS BELOW

The opinion of the court of appeals is reported at 924 F.2d 1539 (9th Cir. 1991). The orders of the district court are unreported. The opinion and orders appear in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1991. A timely petition for rehearing was denied on June 11, 1992. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

Section 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") reads in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury oc-

> curred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. §905(b). 29 C.F.R. §1918.32(b) reads in pertinent part:

> When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances.

STATEMENT OF THE CASE

On June 15, 1986, Carpenter fell 30 feet into a hole in a log stow while on the longshore crew on the PACIFIC VICTORY, injuring his spinal cord, so he is now confined to a wheelchair, a complete paraplegic for life. Because of the injury, a syrinx or cyst developed in his spine. Unless controlled, it could grow, leaving him a partial or complete quadriplegic.

Carpenter was employed by the stevedore, West Coast Stevedoring. Universal Star Shipping owned the vessel. Sealaska Timber Corporation had the vessel under a voyage charter from Daiichi Chuo Kisen Kaisha, which time chartered it from the owner.

Dangerous Condition

The hole Carpenter fell into was a hazard, for it extended down about 30 feet between the edge of the cargo of logs and the skin of the hold. Since workers slip in the hold even at their most cautious, a hole which is three stories deep invites serious injury.

Carpenter was widely regarded as an extremely careful worker.

Knowledge of the Dangerous Condition

Universal Star and Sealaska Timber knew of the danger for two and one-half days before Carpenter's injury.

On June 13, 1986, the first day of loading, the chief officer saw "large broken spaces" in the stow.[1] By the second day, he was concerned enough to talk to the captain about the hazard to longshore workers.[2] On the captain's suggestion, the chief officer told Mike York -- Sealaska Timber's on-site representative -- several times of the danger to the longshore workers.[3]

The chief officer told West Coast's general foreman, walking boss and other supervisors about the danger several times, including once on the second day of loading.[4] Late on the second day of loading, the captain and

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[1] R. 60 Ex. A p. 53-56 (Dep. Erada).

[2] *Id.* at 62-63; R. CR 61 Ex. L p. 81-82 (Dep. Melicor).

[3] R. 60 Ex. A p. 62-64, 68-70, 72-73, 79-82 (Dep. Erada).

[4] *Id.* at 63-64, 68-70, 72-73, 76, 80.

chief officer met with York about the danger.[5]

On the third day of loading, the chief officer again called York's attention to the danger, particularly in hold number 3, where Carpenter eventually fell.[6]

The chief officer testified:

> Q. As best you can recall, what did you say [during the discussion on June 14]?
>
> A. I told, I called the attentions of Mike [York], Mike, *the number two and the number three* [hold], the stowage is not good. Large broken space and *especially in the side of the ship and it looks like dangerous to the stevedores.*
>
> * * *
>
> Q. What did you tell Gary [Derry] Howard [West Coast's general foreman]?
>
> A. I tell Gary [Derry] that the way I load [*sic*] the stowage in *the number two and number three is quite dangerous for the stevedores.*
>
> * * *
>
> Q. When you started your duty on June 15th, *were there the same broken spaces in holds two and three that you had seen on June 14?*
>
> A. *Yes.*

---

[5] *Id.* at 77.

[6] *Id.* at 81-82; R. 60 Ex. F p. 11-13 (Dep. Corpuz).

* * *

Q. As best you can recall, what did you say to Mike York about the broken spaces on June 15?

A. As I told you before, that I informal, so Mike, Mike, I'm afraid I'm not able to load the booking because of the *number two and number three broken spaces still open.*

Q. *Did you mention the safety of the longshoremen or the stevedores when you talked to Mike York that time?*

A. *Yes. . . .*[7]

Improvidence of Relying On Stevedore

Rather than remedy the danger, the stevedore made it worse. The hole was shallow when loading started, but grew progressively deeper and more dangerous, so it was obviously improvident to rely on the stevedore for a remedy.[8]

Before hiring West Coast as stevedore, Sealaska Timber was aware it lacked the skills or experience necessary to load logs. Sealaska Timber's senior vice president Yasuaki Nakatsu knew West Coast had "very poor loading practice[s], maybe less experienced people," was "[n]ot [a] skilled company or [did] not [have] skilled

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[7] R. 60 Ex. A p. 62-64, 73, 79-82 (Dep. Erada).

[8] *See id.* at 64, 75, 79-80.

supervisors" and "are not skilled people."[9] Nakatsu was concerned about hiring West Coast, but put nothing in writing because "it would be too sensitive."[10] He relayed his concerns to the president of Sealaska Timber and a vice president of its parent company.[11] But two firms with whom Sealaska Timber wanted to do business -- one of whom was Klukwan, the parent company of West Coast -- prevailed on him to use West Coast.[12]

Universal Star also knew the stevedore was incompetent or inexperienced. On the first day of loading, the chief officer noticed "the stevedores [were] not expert in handling the loading of logs."[13] When he complained on the first day of loading, York replied,

> [O]h, Chief, I'm very sorry, my stevedores are all new, handling this nature of job.[14]

West Coast supervisors told the chief officer on the second day of loading the longshore workers were inexperienced.[15] By their own observation, the captain, second officer and third officer all knew by the first or second day of loading the stevedore was incompetent or inexperienced

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[9] R. 60 Ex. C p. 84-85 (Dep. Nakatsu).

[10] *Id.* at 86.

[11] *Id.* at 87-89.

[12] *Id.* at 19, 39-41.

[13] R. 60 Ex. A p. 51, 57 (Dep. Erada).

[14] *Id.* at 58, 199; *see also* R. 61 Ex. L p. 93 (Dep. Melicor).

[15] R. 60 Ex. A p. 64-65, 70, 72-74, 86-87 (Dep. Erada).

in loading logs.[16]

On July 3, 1986, the chief officer wrote a report about the accident, saying:

> The longshoreman employed in our vessel were all green-horn of loading logs, this was learned from stevedore foreman, charterer representative and even the stevedores himself admitted that it is their first timer handling such nature of work [*sic*].
>
> During loading operation particular attention was centered more on the stowage, from time to time I made often complained to the stevedores foreman likewise to shipper on account of bad stowage and large broken space. Most especially in hold No. 2 & 3 that causing to one stevedores severe injury. If said operation was properly stowed then he was not able to fell down all the way down on tank top bottom [*sic*].[17]

Failure to Intervene

While they called the holes to the stevedore's attention, the ship's officers never intervened, whether by exercising the owner's right of supervision under the time charter, insisting the stevedore rig a safety net or line or cutting off the power to the winches of the other holds

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[16] R. 61 Ex. L p. 91-92 (Dep. Melicor); R. 61 Ex. O p. 40-41, 44 (Dep. Ocampo); R. 60 Ex. I p. 46-50, 55 (Dep. Tago).

[17] R. 60 Ex. B; R. 60 Ex. A p. 6, 85-87 (Dep. Erada).

until the danger was remedied.[18]

Far from saying he intervened, York denies even being aware the longshore workers were exposed to an unusual risk.[19]

Universal Star's Operational Control

Clause 62 of the time charter retains to Universal Star -- through the captain -- control over the cargo operation.

> Stevedores, when required, shall be employed and paid for by Charterers, but this *shall not relieve Owners from responsibility at all time for proper stowage, which must be controlled by the master,* who shall keep a strict account of all cargo loaded and discharged.[20]

(Emphasis added.) Ship's officers observed the cargo loading in part to help avoid hazards to longshore workers, such as holes in the stow.[21]

By custom in Southeast Alaska, ships' officers help supervise the log loading.[22]

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[18] *See id.* at 75, 77.

[19] R. 39 Ex. G p. 2-3 (Aff. York.)

[20] R. 39 Ex. F.

[21] R. 60 Ex. A p. 13-17 (Dep. Erada); R. 61 Ex. L p. 84, 91-93 (Dep. Melicor); R. 61 Ex. O p. 22-26 (Dep. Ocampo).

[22] R. 60 Ex. H p. 15-18 (Dep. Smith); R. 60 Ex. F p. 30-33, 48, 56-59, 61 (Dep. Corpuz); R. 61 Ex. S p. 39-40 (Dep. Williams); R. 61 Ex. V p. 94-95 (Dep. Wilson).

Sealaska Timber's Operational Control

Under its log marketing contract with Klukwan -- West Coast's parent company -- Sealaska Timber had a duty to supervise the stevedore to ensure compliance with safety regulations.

> Each party shall at all times conduct all operations under this Contract in compliance with *all applicable local, state and federal laws and regulations,* and *shall take all reasonable measures to supervise and assure such compliance on the part of any subcontractors it employs.*[23]

(Emphasis added.) Since the stevedore was its subcontractor, Sealaska Timber had a duty to ensure its compliance with safety regulations. Among them was 29 C.F.R. §1918.32(b), an OSHA regulation which requires the rigging of a safety net or line when a longshore worker is exposed to a risk of falling more than eight feet off the edge of a stow. Carpenter was injured precisely because he fell 30 feet off the edge of the stow.

York was charged by Sealaska Timber with intervening if he learned a stevedore was acting unsafely or had left holes in the stow.[24] Sealaska Timber had established procedures for forcing compliance if the stevedore failed to cure the problem.[25]

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[23] R. 60 Ex. D; *see also* R. 60 Ex. C p. 36-37 (Dep. Nakatsu).

[24] *Id.* at 57-58, 70.

[25] *Id.* at 57-60, 64, 70-72; R. 61 Ex. J p. 68-70 (Dep. McEwen).

Nature of the Case

Carpenter sued Universal Star and Sealaska Timber under §905(b) of LHWCA, alleging (a) both breached their duty to intervene over a known danger and (b) Sealaska Timber was liable for negligently hiring West Coast. The district court had jurisdiction under 33 U.S.C. §§905(b) and 933. It dismissed the case on summary judgment, holding (a) a vessel's duty to intervene is limited to dangers in the ship's gear and (b) an injured longshore worker may not sue for the negligent hiring of the stevedore. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1.
There is an Enduring Conflict Among the Circuits as to Whether a Vessel's Duty to Intervene Under §905(b) of LHWCA is Limited to Dangers in the Ship's Gear

The Court should grant certiorari to resolve a conflict among the circuits as to whether a vessel's duty to intervene under §905(b) of the LHWCA is limited to dangers in the ship's gear. Two years ago, three justices dissented from the denial of certiorari on essentially the same issue.[26] Since then, the conflict has deepened.

A vessel has a duty under §905(b) of LHWCA to

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[26] *Sammiline Company Ltd. v. Woods*, 493 U.S. 1050 (1990) (White, J., dissenting from denial of certioriari).

intervene if it knows or should know of a hazard in the cargo operation, the longshore crew is continuing to work despite an "unreasonable risk of harm" and the stevedore's judgment in failing to stop work is "obviously improvident." *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 175-76 (1981). When it decided *Scindia*, the Court at one point cited "a continuing duty on the vessel to repair defective ship's gear being used by the stevedore" (*id.* at 176), but it described the duty more broadly in another passage as covering "apparently dangerous condition[s] which exist[] or h[ave] developed in the cargo operation" (*id.* at 172). The circuits are divided over whether the duty is limited to hazards in the ship's gear.

Citing a conflict among the circuits on essentially the same question, Justice White -- joined by the Chief Justice and Justice Kennedy -- dissented from the denial of certiorari.

> The Fifth Circuit held in this case that, based on its duties to longshoremen outlined in *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), a vessel can be held liable under §5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as added, 86 Stat. 1263, and amended, 33 U.S.C. §905(b) (1982 ed., Supp. V), for injuries to a longshoreman unloading a vessel caused by the defective stowage of cargo by an independent stevedore. 873 F.2d 842, 846-849 (1989). As recognized by the court below, *id.*, at 848, the Third Cir-

> cuit has held that a shipowner cannot be held liable for such injuries. *See Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (1987), *cert. denied*, 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988).
>
> * * *
>
> *I would grant certiorari to resolve [this] conflict[ ].*

Sammiline Company Ltd. v. Woods, 493 U.S. 1050 (1990). (Emphasis added.)

Here, the Ninth Circuit held:

> It is not enough that the vessel knows or should know of a defect, and that the vessel knows the stevedore's actions have resulted in an unreasonable risk to longshoremen. *It is further required [for the duty to intervene to arise] that part of the ship itself, the ship's 'gear,' cause the injury.*
>
> * * *
>
> *Scindia* limits vessel liability to accidents arising from the ship's gear.
>
> * * *
>
> Since no defective ship's gear is involved in this case, Carpenter cannot establish that custom imposed on the vessel a duty to intervene.

(Appendix p. A-11 through A-14, A-16, A-17). Similarly, the Third Circuit has held:

> It is unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with

respect to the ship, its equipment, and gear.

Derr v. Kawasaki Kisen K.K., 835 F.2d 490, 496 and n.3 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).

Ninth and Third Circuit cases are irreconcilable with Fifth, Second and Fourth Circuit cases. The Fifth Circuit has held:

> [S]ettled case law in this circuit forecloses the conclusion that a vessel does not, with regard to the stevedore and longshoreman, bear any responsibility for the vessel's cargo and its manner of stowage.
>
> * * *
>
> [W]e [have] extended *Scindia*'s imposition of a duty on the shipowner to correct, as to *all dangerous conditions including those relating to cargo*. . . . That duty extends to conditions that arise before or during the stevedoring operations.

Woods v. Sammisa Company, Ltd., 873 F.2d 842, 848-49 (5th Cir. 1989), *cert. denied sub nom. Sammiline Company, Ltd. v. Woods,* 493 U.S. 1050 (1990) (emphasis added); *accord Casaceli v. Marktech International, Inc.*, 774 F.2d 1322, 1328 (5th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986) (there is no "blanket rule" requiring danger to be in ship or its gear); *Futo v. Lykes Brothers Steamship Co., Inc.*, 742 F.2d 209, 215 (5th Cir. 1984) ("[W]e are reluctant to adopt any across-the-board rule that the involvement of a dangerous condition of the ship itself, its gear, or equipment is in all circumstances *per se* . . . necessary . . . to impose a duty" to intervene). Similarly, the Second Circuit has held the duty to intervene covers dangers "not

only in the ship's gear but also . . . transitory conditions on the ship," such as debris left by the longshore crew. *Lieggi v. Maritime Co. of Philippines*, 667 F.2d 324, 328 (2nd Cir. 1981). Without discussing the idea of limiting the duty to intervene to hazards in the ship's gear, the Fourth Circuit has found a breach of the duty when the hazard arose from the stevedore's decision to work without safety netting. *Woodruff v. United States*, 710 F.2d 128, 131 (4th Cir. 1983).

A full study of the issue by the courts of appeals over the past ten years has not resolved the conflict. A vessel on a single voyage down the Atlantic coast will now twice experience changes in the scope of its duty to intervene as it travels from New York in the Second Circuit to Baltimore in the Third Circuit to New Orleans in the Fifth Circuit.

Beyond this, the Ninth Circuit's reasoning is at odds with this Court's decisions. First, the Ninth Circuit said there is no duty to intervene over a hazard in the stow, because the stevedore has "the expertise to prevent or correct the hazard" and is "the best accident avoider." (Appendix A-13, A-15.) But the duty to intervene arises only when the stevedore's judgment is "*obviously improvident*," which is to say its expertise or ability to avoid the accident is already suspect. *Scindia*, 451 U.S. at 175. (Emphasis added.) A vessel is entitled to rely on the stevedore only "*within limits.*" *Id.* at 172. (Emphasis added.) Whether a condition poses an "unreasonable risk of harm to . . . longshoremen" is only a "matter of judgment committed to the stevedore in the *first instance*". *Id.* at 175. (Emphasis added.)

Second, the Ninth Circuit said it would be anomalous to allow an injured longshore worker to recover from the vessel for a danger in the stow created by a stevedore's negligence, when the stevedore could then recoup from the vessel the workers compensation benefits it had paid. But this Court ruled in a §905(b) case:

> Under this arrangement, it is true that the ship will be liable for all damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less.
>
> * * *
>
> Some inequity appears inevitable in the present statutory scheme, *but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoremen whom the Act seeks to protect.*

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 269-70 (1979), *reh'g denied*, 444 U.S. 489 (1979). (Emphasis added.)

Third, limiting it to defects in the ship's gear virtually extinguishes the duty to intervene, for the vessel already has a duty on turning over the cargo areas to the stevedore to exercise reasonable care to ensure the gear is in safe condition. *Scindia*, 451 U.S. at 166-67. Absent mishandling by the stevedore, gear which is safe at the

start will normally stay safe throughout the cargo operation. Under the Ninth Circuit's formulation, a longshore worker could almost never recover for breach of the duty to intervene without also proving breach of the turnover duty, an outcome which makes the duty to intervene all but superfluous. Beyond this, allowing a longshore worker to recover for an injury caused by the stevedore's negligence in handling the gear but not in creating a stow makes little sense. Questions of ownership of the gear cannot justify the difference, for §905(b) applies with as much force to the vessel charterer -- who does not own the gear -- as to the vessel owner.

2.

The Ninth Circuit Decided an Important Question About the Effect of Contract Provisions on the Vessel's Duty Under §905(b) of LHWCA Which Should be Settled by This Court

The Ninth Circuit held a provision in a charter only affects issues of indemnity between parties to the charter, not the vessel's duty of care to longshore workers. But in so doing, it decided an important question of federal law which should be settled by this Court.

The unsettled nature of the law on the issue is apparent. While the petition for rehearing was pending in this case, the Ninth Circuit decided the same issue in another case in a contrary way, holding provisions of a charter could affect the vessel's duty to longshore workers. *Torres v. Johnson Lines*, 932 F.2d 748, 751 (9th Cir. 1991) ("Apparently, Clause 39 of the charter agreement . . .

imposed on [the time charterer] a duty to supervise on- and off-loading operations.") Moreover, dissenting from the denial of certiorari, Justice White -- joined by the Chief Justice and Justice Kennedy -- cited a conflict among the circuits on whether a charter provision like Clause 62 of the time charter here could even shift operational control between parties to the charter agreement. *Woods*, 493 U.S. at 1050; *see also, Hines v. British Steel Corp.*, 907 F.2d 726, 731 (7th Cir. 1990) (citing conflict).

Under *Scindia*, a "contract provision" can trigger a responsibility to "supervis[e] or inspect[ ]" the stevedore's work beyond the duty to intervene. *Scindia*, 451 U.S. at 172. While a vessel's duty of "due care 'under the circumstances'" arises by law rather than contract (*id.* at 166; *see* 33 U.S.C. §905(b)), a contract provision may "bear[ ] on . . . dispute[s]" over the scope of the duty (*id* at 176 n. 23). Since contracts help determine whether a vessel has fully turned over control of the cargo areas to the stevedore, they help define the vessel's "justifiable expectations." *Id.* at 176.

Clause 62 of Universal Star's time charter provides the hiring of a stevedore "shall not relieve [the vessel] Owners from responsibility at all times for stowage which *must be controlled by the master.*"[27] (*See* p. 8, *supra.*) (Emphasis added.) Similarly, a provision in its contract

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[27] Clause 62 of the time charter does not deprive Sealaska Timber of control, for Clause 5 of the voyage charter provides, "Charterers to load, stow, lash, secure, trim and discharge the cargo free of risks and expenses to owners." (R. 39 Ex. E.) Clause 5 gives Sealaska Timber concurrent control with Universal Star over the cargo operation.

with West Coast's parent company obligated Sealaska Timber "to take all reasonable measures to supervise and assure . . . compliance on the part" of the stevedores with "all applicable . . . regulations," one of which required a safety net or line to be rigged in the circumstances here. (*See* p. 9, *supra.*)

The Court should decide whether such provisions can affect the vessel's duty of care toward longshore workers.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas G. Carpenter, *Plaintiff-Appellant*,	)	
	)	No. 88-4059
v.	)	
	)	D.C. No.
Universal Star Shipping, S.A., *a foreign corporation*, and **Sealaska Timber Corporation**, *a foreign corporation*,	)	CV 86-1145-CRD
	)	OPINION
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
October 5, 1989 -- San Francisco, California

A-2

Filed February 12, 1991

Before: Thomas Tang, Cynthia Holcomb Hall and Melvin Brunetti, Circuit Judges.

Opinion by Judge Hall

SUMMARY

Negligence/Statutes

Affirming a district court grant of summary judgment, the court of appeals held that a longshoreman who is injured by the negligence of his own employer may not sue the shipowner under LHWCA for negligent hiring of the employer.

Appellant Thomas G. Carpenter, a longshoreman, was injured while loading a vessel owned by Universal Star Shipping, S.A. Carpenter filed suit against the shipowner and the voyage charterer, Sealaska Timber, under the LHWCA. West Coast Stevedoring, for whom Carpenter worked, had been hired to load the ship with timber logs at the time of the accident. Prior to Carpenter's accident, several comments were made to West Coast and to Sealaska concerning broken spaces in the stow, holes between the piles of loaded logs. Carpenter slipped and fell into a thirty-foot hole between bundles of logs,

sustaining severe and permanent injuries. Carpenter filed suit against Universal Star and Sealaska under LHWCA, alleging negligence. The district court granted appellees' motions for summary judgment on the ground that neither one owed Carpenter a duty to intervene under section 905(b) of the Act.

[1] The court emphasized that both Universal and Sealaska were subject to the duty to avoid negligence under section 905(b) of the Act, rejecting Sealaska's argument that, as a voyage charterer, it owed a lesser duty of care under the statute to longshoremen than to shipowner. [2] The court noted that under *Scindia*, a longshoreman must first show that the vessel knew or should have known of a defect in the ship's gear to establish liability. He must then further show that the vessel knew or should have known that the stevedore's improvident decision to sue the defective ship's gear created an unreasonable risk of harm to longshoremen, and that the vessel could not reasonably expect the stevedore to remedy the situation. [3] In this case, the hole in the stow was unrelated to any equipment of the ship. The hole resulted from the improper loading of the logs by the stevedore, something the stevedore, and not the owner, had the expertise to prevent or correct. In addition, neither appellee acted to assume a duty to intervene. Carpenter failed to establish a legal duty to intervene on the part of either Universal or Sealaska. [4] Since no defective ship's gear was involved in this case, Carpenter could not establish that custom imposed on the vessel a duty to intervene. [5] Clauses in the time charter and voyage charter agreements were improperly relied on by

Carpenter. These clauses determined indemnity issues between the owner and the charterer and did not create a duty to intervene to ensure longshoremen safety during cargo loading. [6] The court noted that safety concerns underlying LHWCA dictated a finding that longshoremen should not be allowed to sue vessels for the negligent hiring of their employers. [7] In addition, Carpenter did not ask the district court to stay consideration of the summary judgment motion pending the deposition of his expert as provided for in Fed.R. Civ. P. 56(f). The district court had sufficient evidence before it to support the motion and did not abuse its discretion in excluding the expert deposition and entering the summary judgment order.

COUNSEL

Abraham A. Arditi, Seattle, Washington, for the plaintiff-appellant.

Mark C. Manning, Bradbury, Bliss & Riordan, Seattle, Washington, for the defendants-appellees Universal Star Shipping.

Steven V. Gibbons, Lane, Powell, Moss & Miller, Seattle, Washington, for the defendants-appellees Sealaska Timber Corporation.

OPINION

HALL, Circuit Judge:

Thomas Carpenter, a longshoreman, was injured while loading a ship. He filed suit, alleging negligence against the owner of the ship, Universal Star Shipping ("Universal"), and the voyage charterer, Sealaska Timber ("Sealaska"), under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq*. The district court granted summary judgment for both defendants. We affirm.

I.

The first Defendant-appellee, Universal, owned the vessel, Pacific Victory, on which Carpenter worked as a longshoreman. The second Defendant-appellee, Sealaska, is a voyage charterer for Alaskan companies that sell their timber to foreign purchasers. Sealaska voyage chartered the Pacific Victory from Daiichi Chuo Kisen Kaisha, a time charterer, and hired West Coast Stevedoring ("West Coast") to load the ship. Carpenter worked as a longshoreman for West Coast, and was loading the Pacific Victory at the time of this accident

Universal had representatives on hand during the loading of the Pacific Victory. The ship's crew observed the loading of the Pacific Victory primarily to ensure that the logs were loaded onto the vessel correctly. If the logs were to shift during the journey, they could upset the vessel's trim.

As the voyage charterer, Sealaska performed several different tasks. First, it hired subcontractors to sort and bundle the logs according to size and length. Sealaska also provided the stevedore, West Coast, with a "line up." The "line up" prescribed the order in which the logs would be loaded; they were to be loaded in the reverse order of

their intended discharge to ensure delivery to the proper buyer. In addition, Sealaska acted as a general coordinator between the various subcontractors who were involved in the overall loading of the Pacific Victory. Sealaska's on-site representative for this job was Mr. Michael York. Mr. York's duties included the supervision and inspection of cargo loading, the preparation of the log loading plan, and the assignment of logs to appropriate holds.

Prior to Appellant-Carpenter's accident, there had been several comments made about the stow to West Coast and to Sealaska, through Mr. York, by various members of the Pacific Victory's crew. Mr. Erada, the ship's chief officer, noticed some "broken spaces in the stow," holes between the piles of loaded logs, after the first day's loading. On the second day of loading, Mr. Erada informed the captain of the ship of these broken spaces. Mr. Erada was concerned about the safety of the stevedores and that the full booking of the ship would not be loaded because of the broken spaces. The captain told Mr. Erada to inform Mr. York of the broken spaces, which he did. Mr. Erada also informed West Coast's general supervisor about the danger the broken spaces represented. Later on the second day of loading, Mr. Erada and the captain again spoke with Mr. York about the broken spaces. On the morning of June 15th, the day of Carpenter's accident, Mr. Erada once again warned Mr. York of the danger. At that time, Mr. York promised to tell his superintendent and the walking bosses about the broken spaces. Later that day, while the crew was attempting to maneuver a bundle of logs into place, Carpenter slipped and fell into a thirty-foot hole between bundles of

logs. Carpenter sustained a severe and permanent back injury as a result of the fall.

Carpenter's claims arise under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. §901, *et seq.* Under the Act, the primary source of relief for injured longshoremen is their right to limited statutory benefits from their employer, regardless of fault. Longshoremen also have a right to sue a limited class of third parties, "vessels," for negligence, *See* 33 U.S.C. §§905, 933; *Edmonds, v. Compagnie Generale Transatlantique*, 443 U.S. 256, 268-71 (1979). A vessel that is found liable cannot get contribution or indemnification from even a more culpable employer, since such contribution or indemnification would undermine the limited, but certain, nature of the employer's liability. 443 U.S. at 268-71. Moreover, the employer has substantial rights to an employee's recovery against a "vessel." First, the employer is entitled to any recovery received by an employee who institutes an action against a "vessel," up to the amount of the benefits received by the employee from the employer. *Id.* at 270. Second, an employer that pays statutory benefits to an employee acquires a right to sue third party "vessels" in the employee's name if the employee does not initiate suit against a "vessel" within six months. *Brown v. American Mail Line, Ltd.*, 625 F.2d 221, 222 (9th Cir. 1980). The employee's acceptance of benefits thus "operate[s] as an assignment to the employer of all rights of the person entitled to compensation." 33 U.S.C §933(b).

Carpenter filed suit against Universal Star and Sealaska under 33 U.S.C. §905(b), alleging negligence. Both defendants filed motions for summary judgment, and

the court granted both motions on the ground that neither defendant owed Carpenter a duty to intervene under section 905(b). Carpenter appeals, claiming that defendants did owe him a duty. Carpenter also claims that Sealaska may be liable on a theory of negligent hiring of the stevedore, and further that the trial court erred in refusing to consider late expert testimony.

This court reviews a grant of summary judgment de novo, *Ford v. Manufacturers Hanover Mortgage Corp.*, 831 F.2d 1520, 1523 (9th Cir. 1987), and views all facts in the light most favorable to the nonmoving party. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II.

[1] Defendants Universal and Sealaska both concede that they are "vessels" under LHWCA. As a result, both defendants are subject to the duty to avoid negligence that is imposed by section 905(b) of LHWCA. Sealaska nevertheless argues that, as a voyage charterer, it owes a lesser duty of care under LHWCA to longshoremen than do shipowners. We have made no such distinction, but have instead applied the same standards to shipowners and charterers. *See Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207-09 (9th Cir. 1989); *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336, 1339-40 (9th Cir. 1983); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1303-04 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); *see also* 33 U.S.C. §902(21) (giving no indication that owners and charterers should be treated differently in defining "vessel," inter alia, as the ship's "owner

[and] . . . charter"(sic)).[1]

III.

[2] Carpenter claims that defendants negligently failed to intervene with the incompetent stevedore to protect him. The Supreme Court addressed the question whether a negligent failure to intervene by the shipowner could produce section 905(b) liability in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). In *Scindia* the Court interpreted section 905(b) in an effort to clear up confusion among the circuits. It held that "there are circumstances in which the shipowner has a duty to act where the danger to the longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Id.* at 176. The court went on to state,

> [The stevedore's] judgment [with regard to the defective winch] was so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and [the shipowner] must be deemed to have been aware of its condition.

Id. at 175-76 (footnote omitted). Under *Scindia*, then, a

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[1] Hereinafter, "shipowner" refers to both Universal Star and Sealaska unless otherwise indicated.

longshoreman must first show that the vessel knew or should have known of a defect in the ship's gear. He must then further show that the vessel knew or should have known that the stevedore's improvident decision to use the defective ship's gear created an unreasonable risk of harm to longshoremen, and that the vessel could not reasonably expect the stevedore to remedy the situation.

The Supreme Court in *Scindia* tread cautiously in imposing liability for failure to intervene on the shipowner. The Court was wisely concerned with the possible consequences of the interaction of the stevedore-employer's right to recover benefits paid an employee from a "negligent" vessel under section 933, and an overly broad reading of section 905(b) negligence. A stevedore who negligently causes an accident, and who as a result must pay statutory benefits to an employee, may invoke his right under section 933 to sue third parties in the name of the injured employee. Such a stevedore can sue a "vessel" under section 905(b), and can claim that the "vessel" should have intervened to cure the stevedore's own obvious negligence. If the employer-stevedore wins he will receive, inter alia, the full amount of benefits paid, and to be paid, to the injured employee. *See* 33 U.S.C. §§905(b), 933. Thus, if section 905(b) is read to impose liability on an owner for negligence that is in the first instance the stevedore's, LHWCA will put all costs on the party who is least able to avoid the accident, the vessel. More importantly, LHWCA will completely eliminate the incentive to act with caution of the party who is in the best position to avoid the accident, the stevedore.

The *Scindia* Court accordingly strictly limited a

vessel's duty to intervene. It is not enough that the vessel knows or should know of a defect, and that the vessel knows the stevedore's actions have resulted in an unreasonable risk to longshoremen. It is further required that a part of the ship itself, the ship's "gear," cause the injury. Such a limitation effectively prevents the misallocation of costs feared by the *Scindia* Court, since it seems that in this specific circumstance the owner is in as good a position as the stevedore to prevent an accident. While the stevedore is in control of the loading operations, the "vessel" runs the ship itself.

We interpreted *Scindia* in *Bandeen v. United Carriers, Inc.*, 712 F.2d 1336 (9th Cir. 1983). In *Bandeen*, the longshoreman was injured while loading logs because no safety wires had been rigged between the stanchions on the ship's deck. Bandeen sued the owner and charterer of the ship for negligence under §905(b). He argued that the owner had a duty to intervene because it knew the stevedore failed to install safety wires. The trial court granted defendants' motion for directed verdicts at the close of the evidence. We affirmed. The *Bandeen* court noted that in those cases in which a duty to intervene had been found either the ship's gear had caused the injury, or the shipowner had affirmatively acted to assume the duty. *Bandeen*, 712 F.2d at 1340. We found no duty to intervene in *Bandeen* because, ". . . the shipowner's equipment and acts did not cause the injury." *Id.*

Carpenter relies on *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1303 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) and *Bueno v. United States*, 687 F.2d 318 (9th Cir. 1983), to argue that a duty to intervene exists here.

However, neither of these cases is on point.

In *Turner* the cargo of the ship collapsed, injuring an offloading longshoreman. The collapse was the result of a defect in the cargo created by the foreign stevedore who had loaded the ship. Although we found the shipowner liable for a failure to intervene, *Turner* is little help to plaintiff, for a key fact makes the case entirely inapposite. In *Turner* the party that had improperly loaded the cargo and thereby caused injury was a foreign stevedore, not the injured longshoreman's employer.

Because *Turner* involved a foreign stevedore and not the longshoreman's employer, the *Scindia* concern that costs be allocated appropriately was not implicated. *See Turner*, 651 F.2d at 1304. First, in cases like *Turner* the employer's ability to recover in the name of the employee under sections 905(b) and 933 cannot eliminate the best accident avoider's incentive to take preventive measures, for the employer is not the best accident avoider in this type of case. In *Turner*, the employer-stevedore had not loaded the ship, and he therefore had no opportunity to prevent the accident.

Moreover, the safety concerns behind the Act actually support liability when, as in *Turner*, the accident is the product of a foreign stevedore's negligence. The foreign stevedore is the party who has an opportunity to prevent the accident, and vessels *can* sue foreign stevedores, though not a more common stevedore-employer, for indemnity. *Turner*, 651 F.2d at 1304. Thus, in the specific factual context of *Turner*, unlike the case now before us, the employee's action against the vessel could result in an action by the vessel against the negligent foreign steve-

dore. The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to perform their work carefully. Since in the instant case the vessel cannot sue the stevedore, *Turner* has no application.

It is also worth noting that the *Turner* court imposed liability because it feared that unless the vessel was liable injured longshoremen would be left "to the mercies of foreign stevedores against which [they] may have no rights or, at least, no practical remedies. *Id.* at 1304. However well-founded the *Turner* court's fear, in the instant case the need to provide a remedy is not so pressing, since the longshoreman has access to his statutory benefits. See 33 U.S.C. §§904, 905.

The second case on which Carpenter primarily relies is also inapposite. In *Bueno* the shipowner voluntarily agreed to make regular safety inspections of sandblasting being done in the hold of its vessel. *Bueno*, 687 F.2d at 320. A fire developed in the hold because of the improper placement of floodlights by the sandblasting contractor and forced the longshoremen to leave. Bueno later went back to work in the hold and fell through scaffolding burned in the fire. Because the shipowner had voluntarily undertaken a duty to conduct safety inspection of the sandblasting operations, we found the shipowner liable for not intervening to remedy the dangerous scaffold. *Id.* at 320-21. Neither Sealaska nor Universal Star voluntarily undertook a duty to inspect the safety of the cargo loading operation. Therefore, *Bueno* is little help to appellant.

[3] In Carpenter's case, unlike *Scindia* and as in

Bandeen, the hole in the stow was unrelated to any equipment of the ship. The hole resulted from the improper loading of the logs by the stevedore, something the stevedore, and not the owner, had the expertise to prevent or correct. In addition, neither defendant acted to assume a duty to intervene. Plaintiff thus fails to establish a legal duty to intervene on the part of either defendant.

Carpenter alternatively argues that even if Universal had no independent legal duty to intervene in the cargo operations for the safety of the longshoremen, custom imposed such a duty.[2] *Scindia* does recognize that it is necessary to inquire "whether the pertinent statutes, regulations or custom place or assume a continuing duty on the vessel to repair defective ship's *gear* being used by the stevedore in the cargo operation." *Scindia*, 451 U.S. at 176 (emphasis added). *Scindia* would thus impose a duty on the vessel to intervene to care for the ship's gear when custom indicates that the vessel is to care for the ship's gear. Again, *Scindia* tread carefully in imposing a duty to intervene, and liability under sections 905(b) and 933, on vessels.

[4] Carpenter asserts that a vessel is liable under section 905(b) if custom imposes on it a mere duty to oversee cargo operations, rather than primary responsibility for the equipment that causes an accident. However, Carpenter's view is at odds with the cost allocation concern that lies behind *Scindia*'s limitation of vessel

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[2] We do not decide in what circumstances custom evidence can be used to establish a duty to discover dangerous conditions. We decide only the issue before us; when evidence of custom can establish that the vessel has a duty to intervene.

liability to accidents arising from the ship's gear. It seems desirable to funnel the costs of accidents, and hence the incentive to prevent them, onto the shipowner when the ship's gear causes the accident and custom imposes on the shipowner the duty to maintain the gear. *Scindia* indicates that liability is in this instance appropriate. But if a shipowner is by custom required only to monitor the performance of the stevedore, then the shipowner has less opportunity to prevent an accident than the stevedore. The stevedore, after all, will actually cause the accident. Although it might increase safety to impose liability on both the stevedore and the shipowner, with the shipowner acting as an additional check on the stevedore, that path is closed to us. For if the shipowner is liable, the stevedore is relieved of all liability. See 33 U.S.C. §§905(b), 933 (discussed previously). Since no defective ship's gear is involved in this case, Carpenter can not establish that custom imposed on the vessel a duty to intervene.

The *Turner* case does not affect this analysis of custom. Although *Turner* allowed custom evidence to support a finding of shipowner liability, it imposed a duty because liability furthered the safety policies of the Act. As discussed before, the policy rationales of *Turner* do not dictate the same result in Carpenter's case.

In *Scindia*, the Supreme Court also acknowledged that the contract between the stevedore and the shipowner may have provisions that specifically establish a duty to intervene. *Scindia*, 451 U.S. at 176 n.23. Carpenter alleges that Sealaska and Universal Star were required by contract provision to intervene in the cargo loading for the safety of the longshoremen.

[5] Carpenter relies on Daiichi Chuo Kisen Kaisha's time charter contract and Sealaska's voyage charter agreement to establish that both defendants owned him a contractual duty of care to oversee the cargo loading operations. Clause 62 of the time charter contract provides that "Stevedores, when required, shall be employed and paid for by charterers, but this shall not relieve owners from responsibility at all times for proper stowage, which must be controlled by the master, who shall keep a strict account of all cargo loaded and discharged." Carpenter also relies on Clause 5 of the voyage charter agreement between Sealaska and Universal Star which states "Charterers to load, stow, lash, secure, trim and discharge the cargo free of risks and expenses to owners." These clauses determine indemnity issues between the owner and the charterer and do not inure to the benefit of the longshoremen. *See Turner*, 651 F.2d at 1305-06.

Scindia recognizes that a contract between the *stevedore* and the shipowner may affect the duty the owner owes. *Scindia*, 451 U.S. at 176 n.23. However, Carpenter argues that the *charter* contracts affect the duty owed to the longshoremen. Contrary to Carpenter's argument. *Turner* establishes that a contract between the time charterer and the shipowner does not affect the duty owed by the shipowner to the longshoremen. *Turner*, 651 F.2d at 1305. The *Turner* contract read, in pertinent part; "[c]harterers are to load, stow and trim and discharge the cargo at their expense and risk under the supervision of the Captain." *Id.* at 1305 n.4. We held that the contract "was not relevant to the *duty* owed by either defendant to the plaintiff," but instead related to the indemnity issue

between the charterer and the owner. *Id.* at 1305 (emphasis in original). Clause 5 of Sealaska's voyage charter agreement uses similar language and also relates to the indemnity issues between the voyage charterer and the owner. Likewise, Clause 62 of the charter contract operates as a risk-shifting provision between the time charterer and Universal Star. However, neither clause creates a duty to intervene to ensure longshoremen safety during cargo loading.

Carpenter has thus failed to raise any genuine issues of material fact regarding a duty to intervene on the part of Sealaska or Universal Star under case law, custom, or contract.

IV.

Carpenter claims that defendants may be liable under section 905(b) for "negligent hiring." It is said that defendants should have known better than to hire Carpenter's employer. It is then claimed that the fact that defendants nevertheless did hire Carpenter's employer should make them liable under section 905(b). It must once again be recalled that if defendants are liable, they are *solely and exclusively liable*, by operation of section 933.[3]

We have not directly ruled on the issue of negligent hiring in the section 905(b) context. Carpenter's reliance on *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir.

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[3] It is worth noting that the Supreme Court in *Scindia* did not mention an action for negligent hiring when setting forth the various circumstances in which a vessel could be found "negligent" for §905(b) purposes. This omission is far from conclusive, however, since the case before the court did not involve a claim of negligent hiring.

1981), *cert. denied*, 459 U.S. 967 (1982), is misplaced. In *Turner* we did hold the vessel liable, but liability was not based on a negligent hiring theory. *Turner* imposed liability because allowing recovery served the safety concerns of LHWCA, as discussed previously. 651 F.2d at 1304.

Carpenter asserts that this court extended *Turner* in *Haluapo v. Akashi Kaiun, K.K., S.A.M., Inc.*, 748 F.2d 1363 (9th Cir. 1984), to create a claim for negligent hiring. Again appellant inaccurately reads our cases. In *Haluapo* a longshoreman who was injured by a defective ship's winch sued a number of section 905(b) "vessels." We found that the time charterer, which had no knowledge of the defect, or control over the defective instrument, had no duty to repair the winch. We then mentioned that the longshoreman "might" have a cause of action against the voyage charterer that had employed the stevedore. *Haluapo*, 748 F.2d at 1365. The language in *Haluapo* does not establish a cause of action for negligent hiring under section 905(b) in this circuit.

Section 905(b) itself does not specify the acts or omissions of the vessel that constitute negligence. See 33 U.S.C. §905(b). Neither does the legislative history give guidance with particularity. It was said that a "vessel's liability was to be 'based on its own negligence' and could be proved only if it was shown 'to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.'" *Scindia*, 451 U.S. at 166 n.13 (quoting S. Rep. No. 92-1125, p. 11 (1972)). Within these general guidelines, much was to be resolved through the application of accepted principles of tort law and the

ordinary process of litigation. *Id* at 10-11.

The Fifth Circuit addressed negligent hiring in the context of §905(b) in *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978). In *Hess*, the injured longshoremen sued the shipowner. He claimed, inter alia, that the owner was negligent in hiring his employer, the stevedore. The court held that the employees of the stevedore company cannot sue the shipowner for negligent hiring. *Hess*, 559 F.2d at 1034-35.[4] The Ninth Circuit is disinclined, absent good reason to create a direct conflict with another circuit. *U.S. v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988).

[6] Moreover, safety concerns underlying LHWCA dictate a finding that longshoremen should not be allowed to sue vessels for the negligent hiring of their employers. The statute places primary responsibility for longshoremen safety during cargo operations on the stevedore. *Taylor*, 739 F.2d at 1387. Congress established this policy because the stevedore, not the vessel, is in the best position to maintain a safe work environment in the cargo hold. *See Id.* And allowing a longshoreman to sue the vessel for negligent hiring for injuries proximately caused by his own employer would frustrate the intent of the statute by placing responsibility for longshoremen safety wholly on the vessel, not the stevedore. See 33 U.S.C. §933 (dis-

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[4] While the Supreme Court in *Scindia* dealt with parts of the *Hess* decision, the Court did not address the issue of negligent hiring. As a result, *Hess* has not been overruled by *Scindia* and is still reliable authority. *See Futo v. Lykes Bros. S.S. Co.*, 742 F.2d 209, 214 (5th Cir. 1984.)

cussed previously). For these reasons, we hold that a longshoreman who is injured by the negligence of his own employer may not sue the shipowner for negligent hiring.

V.

The district court refused to consider deposition testimony of Carpenter's expert, Tom Murphy, in support of the custom argument Carpenter raised in opposition to the summary judgment motions. Carpenter sought to introduce such evidence with his motion to reconsider the trial court's first grant of partial summary judgment. The trial court refused, citing Carpenter's tardy submission of the evidence without explanation. We review the judge's decision to disregard Carpenter's late deposition evidence for abuse of discretion. *Alghanim v. Boeing Co.*, 477 F.2d 143, 148-49 (9th Cir. 1973); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985).

On appeal, Carpenter argues that the affidavit of his expert should be admitted because Sealaska submitted late expert affidavits on May 11, only two days before the date set for the first summary judgment hearing, May 13. Carpenter claims that this late filing by Sealaska prejudiced him because he could not obtain a reply affidavit in time for the scheduled hearing.

Under Fed. R. Civ. P. 56(f), if affidavits needed to support an opposition to a summary judgment motion are unavailable at the time of the motion for summary judgment, the court may refuse to issue the judgment or may order a continuance to allow such affidavits or depositions as are needed to be taken. The opposing party must, however, invoke rule 56(f) by submitting affidavits that indicate why he cannot then present facts essential to

justify his opposition to summary judgment.

[7] If the opposing party fails to take advantage of Rule 56(f), summary judgment may be entered if otherwise appropriate. *Thi-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Carpenter did not ask the district court to stay consideration of the summary judgment motion pending the deposition of his expert as provided for in Fed. R. Civ. P. 56(f). The court had sufficient evidence before it to support the motion and did not abuse its discretion in excluding the expert deposition and entering the summary judgment order.

The district court's order of summary judgment for the defendants is **AFFIRMED**.

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WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Thomas G. Carpenter,	)	
	)	
Plaintiff,	)	NO. C86-1145D
	)	
v.	)	ORDER
	)	
Universal Star Shipping, S.A., et al.,	)	
	)	
	)	
Defendants.	)	
	)	

The Court has before it summary judgment motions brought by Universal Star Shipping ("Universal Star") and Sealaska Timber Corporation ("Sealaska") to dismiss plaintiff's claims. Having considered the memoranda,

affidavits, and supporting documents submitted by counsel, and having heard oral argument, the Court grants Universal Star's motion for summary judgment, and denies Sealaska's motion.

Because of the Court's ruling on the summary judgment motions, Sealaska's motion to dismiss Universal Star's indemnity claim is moot.

BACKGROUND

The parties to this action are plaintiff Thomas G. Carpenter, a longshoreman whose work-related injury gives rise to the action; defendant Universal Star, owner of the M/V PACIFIC VICTORY the vessel on which the injury occurred; defendant Sealaska, the voyage charterer of the PACIFIC VICTORY and the broker of the cargo which was being loaded at the time the injury occurred.

On June 15, 1986, plaintiff Carpenter sustained a severe and permanent back injury. Plaintiff was employed as a longshoreman by West Coast Stevedoring (WCS), at Hobart Bay in Southeast Alaska. WCS had a contract with Sealaska to load logs aboard the PACIFIC VICTORY.

Plaintiff was working inside the hull of the ship as a hatchman. He worked closely with a crane operator, and a hatch boss who coordinated their efforts and directed the placement of the logs. While the crew was attempting to maneuver a bundle of logs into position, plaintiff slipped and fell into a gap between the logs and the hull of the ship. Although plaintiff is unsure of the exact details of the fall, his injury resulted.

Sealaska is a broker for Alaskan companies which sell their timber to foreign purchasers. In this capacity, Sealaska hired subcontractors to sort and bundle the logs

according to species and length; made a line-up chart so that the logs could be loaded aboard the ship in the reverse order of their discharge at foreign ports; directed that the logs be placed in rafts in accordance with the line-up chart; contracted with a tugboat company to maneuver the log rafts along the ship for loading; insured that the logs were properly "marked off" on the ship to insure delivery to the right purchaser and port; and functioned as a general supervisor and facilitator to coordinate efforts between the various subcontractors who participated in the overall sorting and shipping scheme. Although Sealaska's agent, Michael York, had general duties of supervision and inspection over the cargo loading, he did not have authority to issue direct orders to the employees of WCS.

Universal Star, through its crew aboard the PACIFIC VICTORY, also exercised some control over cargo loading. However, Universal Star's control was limited to situations where an improper log stow would adversely affect the trim of the vessel as it went through various stages of loading, transporting and discharging the cargo.

DISCUSSION

Plaintiff's claim arises under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901, et seq. Section 905(a) provides that "the liability of an employer prescribed in §904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ." Plaintiff is therefore barred from making any claim against his employer WCS or other employees of WCS by the exclusive remedy provision of the Act. However, §905(b) provides that:

> In the event of injury to a person covered under this chapter or caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of §933 of this title . . .

Both Universal Star and Sealaska concede that they fall within the vessel classification of §905(b). However, both argue that they had no duty towards the plaintiff and thus should not be liable for his injuries.

The Ninth Circuit dealt with §905(b) liability of the vessel owner and charterer under facts very similar to the instant case. *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336 (1983). The only significant difference between *Bandeen* and the situation here is that Bandeen fell from logs stacked on the deck of the ship, while Carpenter fell from logs which were stacked inside the hull. In *Bandeen*, defendants were the shipowner, the time charterer, and the subcharterer.[1] At the close of the evidence, the district court directed verdicts in favor of all the defendants and the circuit court affirmed the judgment on appeal.

Plaintiff contended during oral argument that the Ninth Circuit opinion in *Subingsubing v. Reardon Smith Line, Ltd.*, 682 F.2d 779 (1982), is relevant to a decision

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[1] The *Bandeen* court treated the ship owner, the time charterer and the subcharterer as "the ship owner" and referred to them collectively as such.

here. However, *Subingsubing* involved the direct commission of an act of simple negligence by the vessel's crew, a much different factual scenario than that presented here. It is the conclusion of this Court that *Subingsubing* is distinguishable and that the *Bandeen* decision is controlling.

In *Bandeen* crew members of the ship and an agent of the subcharterer were on board the vessel and remained there throughout the day's loading. *Id.* at 1338. The *Bandeen* court held that knowledge alone of a safety violation or danger does not create a duty on the part of the ship owner to intervene. *Id.* at 1340. The *Bandeen* court distinguished an earlier case, in which it had held that there was an affirmative duty to intervene when an obvious danger exists, on the grounds that in that case the vessel owner had created the hazard which proximately caused the injury. *Id.* at 1340, referring to *Davis v. Partenreederei M.S. Normannia*, 657 F.2d 1048 (9th Cir. 1981).

Under the *Bandeen* analysis, Universal Star's motion for summary judgment is mandated. Universal Star's only involvement with the cargo loading was its crew's presence aboard the vessel. Despite the volumes of supporting evidence submitted by the parties, nothing indicates that Universal Star created the deep hole in the log stow to which plaintiff attributes his injury. Universal Star had no affirmative duty to intervene even if they knew of the danger and they should not be held liable for the plaintiff's injury.

Similarly, Sealaska would not have a duty to intervene if it did not act to create the hazard. There is no support for a finding the Sealaska created the hazard by

actively directing the log stow. However, there is evidence which indicates that Sealaska may have acted negligently in hiring an unqualified or unreliable stevedoring company.

Evidence relating to negligent hiring indicates that Sealaska was coerced into hiring WCS by the native Alaska corporations for whom they broker timber. The native corporations pushed for granting the stevedoring subcontract to WCS because WCS employs shareholders of native Alaska corporations. Plaintiff's evidence indicates that Michael York, Sealaska's agent, admitted the stevedores were inexperienced, and that a Sealaska executive, Yasuaki Nakatsu, believed that WCS was unreliable.

On the other hand, there is evidence which indicates that WCS was reliable and employed the same longshoremen used by a stevedoring company which plaintiff submits should have been given the job. Although the evidence of negligent hiring is weak and plaintiff's claim may not survive a directed verdict motion if Sealaska produces contrary evidence at trial, sufficient evidence has been produced by plaintiff to preclude summary judgment.

To the extent plaintiff seeks to impose liability upon either Universal Star or Sealaska because of the terms of contracts between themselves or with third parties, the court is unpersuaded. To conclude that liability could have such a basis would be contrary to the

language of §905(b) and to binding legal precedent.[2]

Although Sealaska's motion for summary judgment is denied, negligent hiring is the only claim which remains for resolution at trial.

Plaintiff raised an objection to additional evidence which was submitted by Sealaska and Universal Star after plaintiff filed his response. Most of this evidence related to custom and is not particularly relevant under the *Bandeen* analysis of ship owner liability. However, to the extent the evidence was relevant, the court finds its consideration proper and overrules plaintiff's objection.

Sealaska had also moved for partial summary judgment on the issue of indemnification between themselves and Universal Star. In light of the dismissal of the claim against Universal Star, the indemnification issue is moot.

THEREFORE, defendant Universal Star Shipping's motion for summary judgment dismissing them from this action is GRANTED. Defendant Sealaska Timber Corporation's motion for summary judgment is DENIED.

The Clerk of the Court shall direct copies of this

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[2] 33 U.S.C. § 905(b) provides that "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." *See also Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 at 1305.

Order to all counsel of record.

DATED this 25th day of May, 1988.

/s/ Carolyn R. Dimmick
CAROLYN R. DIMMICK
United States District Judge

__ FILED __ ENTERED
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AUG 2 1988
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Thomas G. Carpenter,	)	
	)	
Plaintiff,	)	NO. C86-1145D
	)	
v.	)	ORDER
	)	
Universal Star Shipping, S.A., et al.,	)	
	)	
	)	
Defendants.	)	
	)	

Both plaintiff and defendant Sealaska Timber Corporation (Sealaska) move for reconsideration of this Court's Order of May 25, 1988, granting partial summary

judgment.[1] In its previous Order, the Court retained jurisdiction over the single issue of whether or not Sealaska negligently hired West Coast Stevedoring. Because this issue had not been fully briefed by the parties at the time of this Court's earlier ruling, reconsideration is warranted. The Court also addresses here plaintiff's more fully developed legal argument in opposition to the issue decided by the Court in its Order granting partial summary judgment.

After full consideration of the memoranda provided by counsel and review of the record, the court reaffirms its prior ruling that neither the vessel owner nor charterer has a duty to intervene in the loading activities of an independent contractor. The court further concludes as a matter of law that an employee of a stevedoring company has no claim against the charterer for negligent hiring of that stevedoring company under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-950.

ISSUE NO. 1

Did the shipowner or charterer (hereafter referred to collectively as "the vessel") have a duty to intervene

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[1] Alternatively, plaintiff requests entry of final judgment pursuant to Fed. R. Civ. P. 54(b) of the claims dismissed in the Order. Defendant Sealaska also moves in the alternative for designation of the remaining issue under 28 U.S.C. §1292(b). Defendant Universal Star Shipping, S.A. (Universal) joins in Sealaska's opposition to plaintiff's motion for reconsideration and supports plaintiff's motion for entry of final judgment under Rule 54(b). However, defendant Sealaska opposes entry of final judgment of part of the claims on the basis that its cross claim against Universal was not resolved in the Court's earlier Order.

when a dangerous condition was created by a stevedoring company, and the vessel could not reasonably expect the stevedore to correct the condition because of its inexperience or incompetence?

In seeking to overturn this Court's earlier ruling, plaintiff relies on language in recent cases interpreting the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-950. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981); *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984); *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336 (9th Cir. 1983); *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 680 P.2d 46 (1984). Additionally, he submits deposition evidence in an attempt to prove that Universal and Sealaska were aware that improper loading created a dangerous condition aboard ship.[2]

Plaintiff places particular reliance on language in *Taylor*, interpreting *Scindia*:

> The *Scindia* court made it clear that the primary responsibility for maintaining a safe condition during cargo operations rests on the stevedore. An exception to this rule is recognized where a ship owner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of

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[2] New deposition evidence offered by plaintiff without explanation is late and unacceptable.

> harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation.

739 F.2d at 1387-88, *citing Scindia*, 451 U.S. at 175-76. Also, in *Bandeen* the Ninth Circuit refers to the *Scindia* holding:

> [I]f the stevedore's use of defective ship gear or failure to correct a dangerous condition is "so obviously improvident" as to present an unreasonable risk of harm to the longshoremen, the ship owner with actual or constructive knowledge of the defect or danger has a duty to intervene and repair the equipment or remedy the dangerous condition.

712 F.2d at 1339, *citing Scindia*, at 175-76.

This Court relied on *Bandeen* in its earlier conclusion that the vessel had no duty to intervene. Plaintiff, however, distinguishes *Bandeen* on the basis that three elements (as enumerated in *Taylor*) are required to establish duty, and the third element (no expectation that the stevedore would correct the situation) was not present there. However, in the instant case he contends that the third element was met, relying on evidence that the vessel's officers knew the stevedore was inexperienced and/or incompetent and could not be expected to remedy the danger.

While plaintiff has come up with a creative argument, this Court concludes that the law does not place on a vessel a duty to intervene where the danger even if known was not related to any act of the vessel or danger

inherent in the equipment or structure of the vessel. The facts and language in the cases support this view. The ship owner has a duty to turn over

> the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia at 167. The *Scindia* case involved a defective winch which was part of the vessel. There is a further reference in *Scindia* to "a continuing duty on the vessel to repair defective *ship's gear* being used by the stevedore in the cargo operations." 451 U.S. at 176 (emphasis added). Moreover, in *Scindia*, the Court rejected imposition of a duty to inspect or supervise the stevedoring operation. 451 U.S. at 168-69.

In *Taylor*, the Ninth Circuit interpreted the *Scindia* holding as focusing the ship owner's duty "on the character of the ship and its equipment -- not on the nature of the cargo." 739 F.2d at 1386. Thus the exception from *Taylor* quoted above can be read to apply the three elements to

only those situations in which the ship or its gear is part of the danger.

This interpretation is consistent with the Washington case on which plaintiff relies, *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 680 P.2d 46 (1984). The *Cowsert* court observed that *Scindia* does not impose on a vessel a duty "to inspect and discover unsafe conditions arising during the course of the independent contractor's work." *Id.* at 413, n.4. The Washington court further addressed the policy behind the statute.

> The LHWCA, as amended in 1972, seeks to encourage safety by placing responsibility for the safety of harbor workers on the party best able to prevent accidents.

Id. at 415.

In the instant case, it was the stevedore who directed log placement and was best able to avoid dangerous placement of the logs. Plaintiff acknowledges that "no one would suggest the vessel was required to rig safety nets or wire around the inside of the perimeter of the hold on turning the ship over to the stevedore. . . . " CP 90 at 8. Moreover, there is no suggestion by plaintiff that the design of the vessel or its structural peculiarities contributed to the dangerous condition.

This Court concludes that the ship owner did not have a duty to intervene in the loading of the logs even if it had knowledge of the incompetence of the stevedore or its crew.

ISSUE NO. 2

Does the employee of a stevedoring company have

a cause of action under the LHWCA for a charterer's negligent hiring of the stevedoring company, when the employee was injured as a result of the stevedoring company's actions?

This Court could find no reported case in which the Ninth Circuit Court of Appeals has addressed this issue directly. Interpretations of state law have gone both ways on the question of whether an owner's duty of care extends to the contractor's employees or only to third parties and the public at large. *See* cases cited in *Nelson v. United States*, 639 F.2d 469, 474-75 (9th Cir. 1980).

Defendant Sealaska relies on a case which predated *Scindia*, *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977), *cert. denied* 435 U.S. 924 (1978). The *Scindia* court refused to adopt the holding of the Fifth Circuit in *Hess* that a vessel has no duty of care to an employee of an independent contractor. The *Scindia* court, however, did not address the issue of negligent hiring. Nor did the *Hess* court, although it held that a shipowner's "duty to provide a safe place to work does not extend to protect employees of an independent contractor from dangers the contractor was hired to correct." *Id.* at 1033. The lower court in *Hess* had found that defendant shipowner did not supervise the work in which the employee was injured, and the shipowner had been given no information that the independent contractor was not fully qualified.

The Ninth Circuit discussed the issue of owner liability under the Restatement in *Nelson v. United States*, 693 F.2d 469 (9th Cir. 1980).

§413. Duty to Provide for Taking of Precau-

> tions Against Dangers Involved in Work Entrusted to Contractor.
>
> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to *others* unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Restatement (Second) of Torts §413 (1965) (emphasis added in *Nelson*).

The *Nelson* court analyzed the meaning of the word "others," questioning whether the owner's (the United States') duty extended to the contractor's employees, or only third parties. The court held that the United States was not liable to the employees of its independent contractor.

> We do not think employees of an independent contractor should be included in these circumstances within the Restatement's definition of "others" for reasons based on the nature of the particular danger and the particular owner involved here.

Id. at 478. Thus the *Nelson* court stopped short of deter-

mining the negligent hiring issue before this Court.

Plaintiff relies on *United States v. Babbs*, 483 F.2d 308 (9th Cir. 1973). That reliance, however, is misplaced. There, the Court of Appeals recognized an exception to the "general rule that one who employs an independent contractor is not liable for injuries to the contractor's employees . . . when the work involved is 'intrinsically dangerous.'" *Id.* at 314.

In another Ninth Circuit case, the court found that a time charterer was not liable for injuries to a longshoreman caused by a defective winch. *Haluapo v. Akashi Kaiun, K.K., S.A.M., Inc.*, 748 F.2d 1363 (9th Cir. 1984). There, the court held that a time charterer had no duty to the employee of a stevedore company where the charterer had no right or ability to control the actions of the crew. The court distinguished these circumstances from those in *Turner* (discussed next) where the time charterer employed the foreign stevedore and had control of the vessel.

The case distinguished in *Haluapo* is a case upon which plaintiff relies, *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied* 459 U.S. 967 (__). Under the facts of *Turner*, plywood had been stored on a ship in Japan, by a Japanese crew. Plaintiff was an employee of the stevedoring company offloading plywood in the United States. He was injured by the improper storage of the plywood. The *Turner* court held there was a duty imposed on the vessel and time charterer to protect the longshoreman against concealed dangers. The court premised its decision in large part on the fact that there had been no fault by the United States' stevedore, and the danger of the improper stow was not known to it.

Thus *Turner* is distinguishable from the instant case. Here, plaintiff alleges that his injuries resulted from the improper loading of logs by his employer WSC. Even were plaintiff to prove that Sealaska as the charterer hired WSC knowing it was inexperienced or incompetent, this Court would not extend liability to Sealaska under the LHWCA. As discussed under Issue I above, the LHWCA places responsibility on the party best able to assure the safety of the longshoremen. An injured third party may have a cause of action against an employer of an independent contractor for negligent employment. It does not serve the purposes of the LHWCA, however, to extend such a cause of action to the employer of the independent contractor.

THEREFORE, summary judgment is GRANTED, and this case is DISMISSED WITH PREJUDICE.

The Clerk of the Court shall direct copies of this Order to all counsel or record.

DATED this 2nd day of August, 1988.

/s/ Carolyn R. Dimmick
CAROLYN R. DIMMICK
United States District Judge

D-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Thomas G. Carpenter,	)	
	)	
Plaintiff,	)	JUDGMENT IN
	)	A CIVIL CASE
v.	)	
	)	CASE NUMBER:
Universal Star Shipping, S.A., et al.,	)	C86-1145D
	)	
	)	
Defendants.	)	
	)	

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED summary judgment is granted and this action is dismissed with prejudice.

x FILED x ENTERED
__ LODGED __ RECEIVED
AUG 3 1988
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

Date August 3, 1988

Bruce Rifkin,
Clerk

Elva McGregor /s/
(By) Deputy Clerk

FILED
JUN 11 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas G. Carpenter,	)	
	)	
Plaintiff-Appellant,	)	No. 88-4059
	)	
v.	)	D.C. No. CV-86-1145-CRD
	)	
Universal Star Shipping, S.A.	)	
a foreign corporation,	)	ORDER
and **Sealaska Timber Corporation**, *a foreign corporation,*	)	
	)	
Defendants-Appellants,	)	

Before: **TANG, HALL** and **BRUNETTI**, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc in **REJECTED**.